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No. 87-1555

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1987

JAMES H. BURNLEY, IV, *et al.*,  
*Petitioners,*

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF  
AMICI CURIAE AND BRIEF AMICI CURIAE  
OF THOMAS COLLEY, ANN K. FINKBEINER,  
DENISE R. EVANS, ANNE B. LACKMAN,  
HAROLD LACKMAN, ERNEST H. BARRY, JR.,  
HARRY BAUER, LORE BAUER, ANNA KAMOLA,  
JESSE CORTI, ARTHUR W. JOHNSON,  
AND ANNE H. JOHNSON  
IN SUPPORT OF PETITION FOR CERTIORARI

JOHN G. KESTER \*  
JOHN J. BUCKLEY, JR.  
STEPHEN L. URBANCZYK  
Hill Building  
Washington, D.C. 20006  
(202) 331-5000  
*Attorneys for Amici Curiae*

*Of Counsel:*  
WILLIAMS & CONNOLLY  
Hill Building  
Washington, D.C. 20006

(Attorneys of counsel continued inside cover)

\* Counsel of Record

*Of Counsel (continued):*

**WILLIAM C. SAMMONS**

**TYDINGS & ROSENBERG**  
201 North Charles Street  
Baltimore, Maryland 21201

**BERTRAM D. FISHER**

**QUELLER, FISHER, BOWER  
& WISOTSKY**  
110 Wall Street  
New York, New York 10005

**STANLEY J. GLOD**

2323 Creek Drive  
Alexandria, Virginia 22308

**JOHN P. COALE**

**COALE, KANANACK & MURGATROYD**  
1507 - 22d Street, N.W.  
Washington, D.C. 20037

**CHARLES I. APPLER**

**HAMEL & PARK**  
888 - 16th Street, N.W.  
Washington, D.C. 20006

**THOMAS L. BRIGHT**

**MARK, WEIGLE AND PERKINS**  
115 East King Street  
Shippensburg, Pennsylvania 17257

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**MOTION FOR LEAVE TO  
FILE BRIEF *AMICI CURIAE***

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Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Harry Bauer, Lore Bauer, Anna Kamola, Jesse Corti, Arthur W. Johnson and Anne H. Johnson respectfully move for leave to file the attached brief *amici curiae* in support of petitioners. Counsel have obtained the consent of petitioners to filing of this brief, and the Solicitor General's letter to that effect has been lodged with the Clerk. Respondents have declined to consent to the filing of this brief.

### INTEREST OF THE *AMICI CURIAE*

*Amici* are survivors of some of the sixteen persons who were killed on January 4, 1987 outside Baltimore, Maryland when a Conrail locomotive driven by a marijuana-smoking engineer and brakeman ran stop signals and proceeded into the path of an Amtrak passenger train *en route* from Washington, D.C. to Boston.\* The interest of the *amici* is in assuring that persons under the influence of drugs and alcohol not be permitted to operate or control trains, and that laws and regulations designed to prevent such unnecessary disasters not be struck down by judicial decisions, like the one of the United States Court of Appeals for the Ninth Circuit for which review is sought here, which fail to give adequate constitutional weight to the needs of public safety. This brief seeks briefly to outline for the Court information from judicial records that illuminates exactly what can happen when adequate drug testing of railroad employees does not take place.

### ISSUES TO BE COVERED IN THE BRIEF *AMICI CURIAE*

The attached brief does not retrace the ground covered in the petition for certiorari. Instead, it seeks to bring to this Court's attention how greatly the Court of Appeals' decision threatens public safety, by reference to actual recent instances in which abuse of drugs and alcohol by railroad employees has contributed to injury and death of railroad passengers.

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\* *Amici* are plaintiffs in actions consolidated for discovery pending in the United States District Court for the District of Maryland. *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728. Counsel for *amici* were appointed by the District Court as lead counsel for the plaintiffs in those consolidated cases. Counsel for *amici* also represent persons injured in the 1988 collision referred to at p. 6 of the *amicus* brief. *Sala v. National Railroad Passenger Corp.*, No. 88-1572, U.S.D.C., E.D. Pa.

### CONCLUSION

For the reasons stated, the motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted,

JOHN G. KESTER \*  
JOHN J. BUCKLEY, JR.  
STEPHEN L. URBANCZYK  
Hill Building  
Washington, D.C. 20006  
(202) 331-5000

*Attorneys for Movants*

#### *Of Counsel:*

WILLIAMS & CONNOLLY  
Hill Building  
Washington, D.C. 20006

WILLIAM C. SAMMONS  
TYDINGS & ROSENBERG  
201 North Charles Street  
Baltimore, Maryland 21201

BERTRAM D. FISHER  
QUELLER, FISHER, BOWER  
& WISOTSKY  
110 Wall Street  
New York, New York 10005

STANLEY J. GLOD  
2323 Creek Drive  
Alexandria, Virginia 22308

JOHN P. COALE  
COALE, KANANACK &  
MURGATROYD  
1507 - 22d Street, N.W.  
Washington, D.C. 20037

CHARLES I. APPLER  
HAMEL & PARK  
888 - 16th Street, N.W.  
Washington, D.C. 20006

THOMAS L. BRIGHT  
MARK, WEIGLE AND  
PERKINS  
115 East King Street  
Shippensburg, PA 17257

\* Counsel of Record

April 15, 1988

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IN SUPPORT OF PETITION FOR CERTIORARI  
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This brief *amici curiae* is filed by Thomas Colley, Ann K. Finkbeiner, Denise R. Evans, Anne B. Lackman, Harold Lackman, Ernest H. Barry, Jr., Harry Bauer, Lore Bauer, Anna Kamola, Jesse Corti, Arthur W. Johnson and Anne H. Johnson, contingent on the granting of the foregoing motion for leave to file. The interest of the *amici* is set forth in that motion.

**SUMMARY OF ARGUMENT**

The decision below, which holds that the Fourth Amendment prohibits most testing of railroad employees for drugs and alcohol, clearly conflicts with decisions of other courts of appeals that allow drug testing in many

other contexts. By its grant of certiorari in *National Treasury Employees Union v. Von Raab*, No. 86-1879, this Court will be considering one narrow and non-life-threatening aspect of the issue: testing Customs agents. Even more important, however, and therefore conceivably governed by different principles, is drug testing where the safety of the public is directly at stake. In order to have a fuller perspective on these issues in the context where they most matter—and also to protect the public from the danger to innocent victims that decisions like the Ninth Circuit's here may create—*amici* urge this Court to hear this case along with No. 86-1879, and not simply to hold it for disposition in light of principles which may not adequately reflect valid and weighty concerns of public safety that are present when impairment of the faculties of operators of public transportation is involved.

### ARGUMENT

In this case the Ninth Circuit has issued a ruling that takes little account of the realities and dangers of modern life. It not only misinterprets the flexible and practical standard of the Fourth Amendment (which prohibits only those searches and seizures that are “unreasonable”), and is clearly irreconcilable with decisions of other courts. More than that, it actually places innocent lives in jeopardy.

In terms of legal argument, *amici* do not seek here to embellish the petition filed on behalf of the Secretary of Transportation and the Federal Railroad Administrator. *Amici* do seek to bring to the Court's attention the consequences in the real world when there is no adequate testing for drug- and alcohol-induced impairment of the persons who control the operation of locomotives in this country. Among several recent examples, *amici* refer in particular to a horrible and utterly unnecessary rail collision, caused in part by drug use by railroad employees, in which *amici*'s family members died.

The pertinent facts about that January 4, 1987 disaster in which sixteen people, several of them children, were killed, and nearly 200 other passengers were injured, are not in dispute. On that Sunday at 12:35 p.m., the *Amtrak Colonial* left Union Station in Washington, D.C., with an intermediate stop in Baltimore, carrying approximately 650 passengers, many of them students returning to school and families returning home after the holidays. At 1:16 p.m. a train of three Conrail locomotives left the Bayview Yard in Baltimore heading north on tracks that converged with the tracks used by *Amtrak* passenger trains in the Northeast Corridor.

The Conrail train was driven by engineer Ricky Lynn Gates. Assisting him in the cab was brakeman Edward “Butch” Cromwell. As they proceeded, sometimes exceeding speed limits, Gates and Cromwell took “hits” on a joint of marijuana, ignored signals, and watched the scenery. Neither Gates nor Cromwell was paying any attention as the train ran through a series of slow and then stop signals and finally (as Gates in panic hit the emergency brakes) at 1:30 p.m. skidded into the path of the *Amtrak* train, which was approaching from behind at a speed in excess of 100 miles per hour. The engineer of the *Amtrak* train and fifteen of its passengers were killed. Approximately 158 others were seriously injured.

Both Gates, the engineer, and Cromwell, the brakeman, were longtime habitual abusers of drugs and alcohol. Gates in later pleading guilty to manslaughter<sup>1</sup> acknowledged a factual finding that:

Although *Amtrak* operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, contain-

<sup>1</sup> *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

ing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint. (P. 1a, *infra*.)

As the engineer later testified:<sup>2</sup>

Q. . . . What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I would prefer if we were going to smoke anything, to wait until we got on the Port Road branch. . . .

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt it was more enjoyable there.

\* \* \* \*

Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

\* \* \* \*

I know I was talking to Butch, I glanced at him. . . . I probably glanced at the speed indicator at some point, the scenery around me and the signal. I was taking in quite a bit. (Pp. 4a-6a, *infra*.)

The Conrail engineer's abuse of drugs and alcohol was nothing new. He testified:

<sup>2</sup> In a deposition in consolidated civil actions arising out of the collision, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md.

Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to one case?

A. Average consumption was close to a case, yes.

MR. SARFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

\* \* \* \*

Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

\* \* \* \*

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

\* \* \* \*

Again, I might add I am subject to blackouts under the influence of drugs and alcohol. (Pp. 7a-9a, *infra*.)



The brakeman testified that this was not the first time that he and the engineer had operated a locomotive while smoking marijuana. Pp. 10a-11a, *infra*. Nor was drug use by these two railroad workers unique. The engineer testified to having been sent to drive a locomotive when he said he was too drunk to drive an automobile. P. 12a, *infra*. He also testified:

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

\* \* \* \*

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe. (Pp. 8a-9a, *infra*.)

The collision outside Baltimore unfortunately is not an isolated incident. As the petition notes, at 3, the Federal Railroad Administrator in 1983 found that "Alcohol impairment and drug impairment have been identified as causal or contributing factors in a number of train accidents and employee fatalities over the past ten years." 48 Fed. Reg. 30723 (1983); see also 50 Fed. Reg. 31508 (1985).

Since that time the problem has not been cured. In addition to the collision previously described, there have been other documented serious drug-related railroad accidents recently. For example, on January 29, 1988, near Chester, Pennsylvania, an Amtrak passenger train plowed into a railroad maintenance-of-way vehicle on the

tracks ahead of it. At least nineteen persons were injured. The operator of the switch which should have stopped the train hid from authorities for three days; when he gave himself up and was tested, his urine showed positive for use of four different drugs: marijuana, cocaine, methamphetamine, and amphetamine. See pp. 15a-17a *infra*.

Drug testing of public employees is one thing in the context of Customs agents, the case in which this Court has already granted certiorari. *National Treasury Employees Union v. Von Raab*, No. 86-1879. It may be quite another in the far more compelling case where the persons who claim that their drug habits are their own constitutionally secret business are driving four-hundred-ton locomotives and killing and injuring members of the public.

The existence of widespread drug and alcohol abuse by railroad employees is increasingly well documented. It is a public danger that is not beyond corrective actions. *Amici* respectfully submit that the Fourth Amendment does not stand in the way of the wise and needed—indeed, really minimal—precautions that the Ninth Circuit here, invoking that Amendment, outlawed. This Court's consideration of the Fourth Amendment's rule of reason as applied to drug and alcohol testing will be illuminated if certiorari is granted to consider the case of workers who threaten the public safety as well. The "integrity of their bodies," Pet. Cert. 21a, which the Ninth Circuit concluded was a dominant concern at stake, should include consideration of the integrity of the bodies of passengers killed or injured as a result of drug and alcohol abuse by railroad employees.

# CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

JOHN G. KESTER \*  
JOHN J. BUCKLEY, JR.  
STEPHEN L. URBANCZYK  
Hill Building  
Washington, D.C. 20006  
(202) 331-5000

*Attorneys for Amici Curiae*

*Of Counsel:*

WILLIAMS & CONNOLLY  
Hill Building  
Washington, D.C. 20006

WILLIAM C. SAMMONS  
TYDINGS & ROSENBERG  
201 North Charles Street  
Baltimore, Maryland 21201

BERTRAM D. FISHER  
QUELLER, FISHER, BOWER  
& WISOTSKY  
110 Wall Street  
New York, New York 10005

STANLEY J. GLOD  
2323 Creek Drive  
Alexandria, Virginia 22308

JOHN P. COALE  
COALE, KANANACK &  
MURGATROYD  
1507 - 22d Street, N.W.  
Washington, D.C. 20037

CHARLES I. APPLER  
HAMEL & PARK  
888 - 16th Street, N.W.  
Washington, D.C. 20006

THOMAS L. BRIGHT  
MARK, WEIGLE AND  
PERKINS  
115 East King Street  
Shippensburg, PA 17257

\* Counsel of Record

April 15, 1988

## **APPENDICES**

## APPENDIX A

Excerpt from transcript, *State v. Gates*, No. 87-CR-2420, Circuit Court, Baltimore County, Maryland, February 16, 1988.

\* \* \* \*

[45] On moving out onto Track 1 out of the yard, Cromwell sat in the firemen's seat while the Defendant sat at the controls. Both faced forward. The Defendant called out the first two to three signals within one and a half miles of the yard as Clear, which would be displayed as these signals on this chart. And, at that time, Cromwell acknowledged the Defendant calling out nine signals. Although Amtrak operating rules require that the engineer call each wayside signal and that the brakeman acknowledge, no more signals further down the track were called in the remaining nine miles. After the third signal, Cromwell pulled out a pin joint, which is a very thin, hand-rolled cigarette, containing marijuana that he had brought in his grip. Although he had originally intended to use it on the ride home, Cromwell decided to smoke it then with the Defendant because the two smoked while working on one previous occasion. Each man had about three hits of the joint. Then Cromwell smoked the remainder in a pipe. Although both the Defendant and Cromwell were faced forward and could clearly see the wayside signals, neither called them while smoking the joint.

\* \* \* \*

[56] The Victims Of The Collison. In addition to the death of the Amtrak Engineer, Jerome Evans, 15 passengers were killed as a direct result of the collison. Caroline and Uriel Bauer, ages 26 and 27, respectively, a recently married couple who resided in Manhattan, New York, both occupied the second [57] coach car, which is the second passenger car in the consist. Caroline was pronounced dead at 7:12 p.m. on January 4th, 1987 as a



result of cranial injuries and smoke inhalation. Her husband, Uriel, was pronounced dead at 3:57 a.m. on January 5th, 1987 as a result of compression asphyxiation.

Esther Burkhart, age 71, who lived in Philadelphia, Pennsylvania, also occupied the second car. Mrs. Burkhart died as a result of multiple traumatic injuries primarily to her head and chest.

James Clay, age 33, from Vernon, Connecticut, sat in the second car. Mr. Clay was pronounced dead at 4:38 a.m. on January 5, 1987 as a result of compression asphyxia.

Thomas C. Colley, age 18, a freshman at the Rhode Island School of Design, sat in the second car on his return to school in Providence. Thomas was pronounced dead at 7:45 p.m. as a result of multiple blunt injuries, burns and smoke inhalation.

Laura Corti, age 22, occupied the second car on her return home to New York City. She was pronounced dead at the scene at 4:05 a.m. on January 5, 1987 from compression asphyxia.

Louise Edler, age 70, a resident of Wayne, Pennsylvania, occupied the third car in the consist. Mrs. Edler died of multiple injuries.

Ceres M. Horn, age 16, a resident of Baltimore County, Maryland was returning to school at Princeton [58] University, where she was a freshman honor student. Ceres, who sat in the second car, died as a result of compression asphyxia.

Christiane Johnson, age 20, a senior at Stanford University, rode in the second car traveling from her parents' home in Potomac, Maryland to New York to visit her sister. Christiane was pronounced dead at 4:48 a.m. on January 5, 1987 as a result of compression asphyxia.

Corrine and Kirsten Luce, sisters, age 13 and 16 respectively, occupied the second coach car on their return

home to Westerly, Rhode Island. Kirsten was pronounced dead at 5:25 a.m. on January 5, 1987 from cranio-cerebral trauma. Corrine was pronounced dead at 1 o'clock p.m. on January 5, 1987 due to multiple trauma to the cranio-cervical and thoracic region.

Adam Moore, age 7, and his grandmother, Peggy Moore, age 52, were seated in the second car on their trip home to Neptune, New Jersey. Adam was pronounced dead at 11:24 p.m. on January 4, 1987 as a result of compression asphyxia. Mrs. Moore was pronounced dead on January 5, 1987 at 1:14 a.m. due to multiple injuries.

Christina Piasecka, age 41, from Warsaw, Poland occupied the third car. Ms. Pisasecka died of multiple injuries.

Connie Barry, age 31, occupied the second car on her return home to Ridgefield, Connecticut after visiting family in the Washington area. Mrs. Barry was trapped in the wreckage for 10 hours while rescue workers attempted to free her. She [59] was flown by helicopter to Shock Trauma, where she subsequently died at 6:20 a.m. on January 13, 1987 as a result of multiple injuries and hypothermia.

Approximately 174 passengers and crew of the Colonial sustained serious injuries and required treatment at local hospitals. Numerous fire fighters, police, paramedics, and National Guard responded to the wreck site to render emergency assistance.

. . . .

## APPENDIX B

Excerpt from deposition of Ricky L. Gates, *In re Rail Collision Near Chase, Maryland on January 4, 1987 Litigation*, MDL No. 728, U.S.D.C., D. Md., March 24, 1988.

\* \* \*

[74] Q. When you left the Bayview Yard, what did you and Mr. Cromwell do?

A. We started some general conversation, I don't remember specifically what all the conversation was. It generally had to do with he was saying about a trip before then, we were complaining about the condition of the engines and that they should have been prepared for us before we signed up, and as we got north of River Interlocking, I believe, he had pulled out half of a pin joint of marijuana and asked if I wanted to smoke some.

Q. Up to that point had you been calling out [75] the signals?

A. Those two signals I did call.

Q. Which ones were they?

A. North Point and River.

Q. Was Mr. Cromwell also required to call out the signals?

A. Yes.

Q. Did he call out those first two signals?

A. I don't recall him calling them out, no.

Q. Do you recall him calling out any of the signals?

A. No.

Q. Did you call out any signals after River?

A. Not to my knowledge. Well, other than the stop signal, when I saw that.

Q. At the Gunpow Interlocking?

A. Yes.

Q. Okay. What did you do when Mr. Cromwell pulled out the marijuana cigarette at about River?

A. He asked me if I wanted to smoke it then, and I told him it was his, it was up to him, that I [76] would prefer if we were going to smoke anything, to wait until we got on the Port Road branch.

MR. SARSFIELD: Wait until what? I am sorry.

A. Until the Port Road branch.

Q. What was the reason you wanted to wait for the Port Road branch?

A. The scenery was better, the river on one side, the trees on the other, I felt it was more enjoyable there.

\* \* \*

[77] A. The next thing I remember, we were still talking, I don't remember the exact nature of the conversation, we were still in the nature of complaining about the engines and him telling me something about the trip before then and his brother or something. And he put what was left of the joint into a pipe and he started lighting it up.

Q. At that point you had had three hits on the joint?

A. I believe so, yes.

Q. And then he put the remains of the joint into a pipe; is that correct?

A. Yes.

Q. What did he do with that?

A. He lit it up. He passed it to me at one point, but it had gone out, and I could—I don't recall whether I either tasted it before I tried to [78] light it, or I just smelled it, but I could smell the remnants of PCP in the pipe. And I handed it back to him and more or less I was agitated about it, and I mentioned it to him, and he told me it was his girlfriend's pipe and she had probably smoked it.

Q. Does PCP have an odor?

A. Yes, like parsley flakes. That was the only experience I had ever had with it years before, and that is what it smelled like, and so that's what I assume it was.

\* \* \*

[82] A. Next thing I recall is through the conversation, I was running assuming we were going to go out or keep moving at Gunpow Interlocking, and I was trying to



make, save as much time as I could, I pulled the throttle out a little more is the last thing I remember.

\* \* \*

[88] Q. Now, as you were approaching signal 816, what were you looking at?

A. I don't recall specifically, for the same reasons. I know I was talking to Butch, I glanced at him, because that's at the point where he was cutting off the tops of the water bottles, and I observed part of that. I probably glanced at the [89] speed indicator at some point, the scenery around me and at the signal. I was taking in quite a bit.

\* \* \*

[104] Q. All right. What happened next?

A. Like I say, the general conversation, looking around at the scenery, then I suppose at approximately five to six pole lengths at the point [105] where I would have started slowing down to 40 before the interlocking I glanced up and I noticed the stop signal in front of me. I yelled to Butch more or less something obscene was the adjective I used that we got a stop signal, put it into emergency with the automatic brake, put the independent brake all the way on, put the throttle completely in the off position, took the reverser and threw it to the south position, pulled the throttle back out, which is called plugging the engines. We started sliding through, I grabbed the portable radio, just before we got under the signal, I started yelling three emergencies and started yelling our location and what was going on, that we were going through the stop signal, and I was more or less giving a play by play, that I wasn't sure we were going to get through the switch or not. Butch at that point was putting on his jacket, and he got off around the front of the engine and went down on the steps and as we slid slowly through the switch, he stepped off on to the ground and stood [106] at the switch as we continued sliding further.

\* \* \*

[140] Q. What quantities were you normally drinking alcohol?

A. Anywheres from a minimum of a six-pack a day to a case and a half, two cases a day.

Q. A six-pack to a case or two cases a day; is that correct?

A. Sometimes, yes.

Q. And what was your average consumption? Was it closer to the one case?

[141] A. Average consumption was probably close to a case, yes.

MR. SARSFIELD: What was the answer to that? Average consumption was what?

A. Probably close to a case of beer a day.

Q. It was that pretty much every day?

A. Almost every day, yes.

Q. And by a case of beer, of course, we are referring to 24, 12-ounce cans of beer; is that correct?

A. Yes.

Q. For what period of time had you been consuming alcohol at that rate of almost a case a day, or over a case a day?

A. I would say for close to a year at that time.

Q. And during what times of day would you do your drinking?

A. Any time.

Q. What time of day would you start drinking?

A. Any time.

\* \* \*

[142] Q. How frequently were you using marijuana at this point in time?

A. Maybe once or twice a week.

Q. How much would you use over the week, in terms of a quarter of an ounce?

[143] A. Usually two or three joints at that time. Prior to Christmas, I believe a couple of weeks before Christmastime, I had been on vacation for a week, and I

had smoked about a quarter ounce of marijuana while I was on vacation.

Q. For what period of time had you been using marijuana at this rate?

A. Since about the age of 18.

\* \* \*

BY MR. BUCKLEY:

Q. Would you admit that if you had not had the distractions and had been paying attention, you would have been able to see the home signal in time and to have stopped before going through the switch at Gunpow?

A. Probably would have, yes.

\* \* \*

[215] A. I was starting to believe that I was psychologically addicted to marijuana, that—because I couldn't make myself quit, unless I replaced it with alcohol. And I was daydreaming quite a bit, when I was off to myself.

Q. Did you ever use hash?

A. Yes.

Q. How frequently did you use hash, hashish?

A. Not very frequently, you know. You use it just the same way as I would marijuana, but it wasn't as available.

Q. Did you use it in 1986?

A. I can't recall specifically; maybe.

Q. Did you ever use marijuana or any other illegal drugs with any of your Conrail co-workers?

A. Yes.

Q. The answer is yes?

A. Yes.

Q. On how many occasions?

A. I don't know.

[216] Q. Did that occur in 1986?

A. Yes.

Q. Was that a fairly frequent occurrence?

MR. SARSFIELD: Objection to leading.

Q. How frequent was the occurrence?

MS. SHEARER: If I might have a moment.

A. Would you repeat the question, please?

Q. How frequently did you use marijuana with your Conrail co-workers in 1986?

A. I can't recall any—I don't know how to answer it as far as frequency goes, but it was a number of times.

Q. More than ten?

A. Probably.

Q. More than 20?

A. Maybe.

\* \* \*

[222] A. . . . Again, I might add I am subject to blackouts under the influence of drugs and alcohol.

Q. How common is the use of drugs or marijuana by Conrail employees?

MR. SARSFIELD: Objection.

A. I couldn't answer that.

Q. What is the reason you couldn't answer that?

A. Because I am not accountable for everyone else.

Q. Just talking in terms of your knowledge, [223] based on your knowledge, how frequent is the use of marijuana or other illegal drugs by Conrail employees?

MR. SARSFIELD: Objection, please.

A. Again, I can only answer for myself, and whoever was around me, if they did it, and they were around me when I was doing it, then we did it, or if they had it, I was around them, we did it. But I am not sure how to answer as far as frequency goes. Sometimes it was infrequent, sometimes more frequent than others.

Q. So it is something you did have occasion to observe from time to time; is that fair to say?

A. Yes.

Q. Okay. How long have you been subject to blackouts?

A. I am not sure about that either. I hadn't even been aware of it, until I started into recovery, that I was having blackouts.

\* \* \*



## APPENDIX C

Excerpt from testimony of Edward Walter Cromwell before the Grand Jury, in the Circuit Court for Baltimore County, Maryland, *In re Special Investigation*, May 1, 1987.

\* \* \*

[103] Q: Were you doing anything at that time besides calling the signals?

A: That's when I reached in and got my joint out.

Q: The pin joint?

A: Yes.

Q: At what point? Was it after you called those two signals or before or during?

A: I believe it was right after or maybe even before [104] the North Point signal.

Q: Before the North Point signal?

A: I'm not exactly sure, but it was right outside of the yard.

Q: Outside of the yard?

A: As we were leaving Bay.

Q: As you were leaving Bay while you were on track number one?

A: Right, yes.

Q: And did you light the joint?

A: Yes, I did.

Q: What did you do with it?

A: We smoked it.

Q: When you say we, who do you mean?

A: Rick and I smoked.

Q: And how many hits off of it did you have?

A: I believe three.

Q: And how many did Rick have?

A: Probably about three also.

Q: Now, why did you pull that out? Why did you do that with Gates?

A: I have smoked with him on one other occasion.

Q: On a train?

A: Yes.

Q: When he was the engineer?

[105] A: Yes.

Q: What did you do with the remainder that was left of the joint after you each took some hits?

A: I smoked the roach in a bowl that I had.

Q: And by bowl you mean—

A: Pipe.

Q: And what did you do after that?

A: Put the bowl in my bag and started making lunch.

\* \* \*

[115] A: I went back up to the north engine, the 5044, to see if Rick was okay, dead, or what was going on.

Q: And what did you find when you got up there?

A: He wasn't there and the portable radio wasn't there.

Q: So, what did you do?

A: I got my bowl out of my bag and got back down off the engine and I hid the bowl somewhere in somebody's yard. I'm not sure where. I started walking up to where the wreck was. I seen a rescue worker and they asked me if I was involved in the wreck. I said, Yes. He said, Walk out to the road and get in an ambulance.

\* \* \*

[125] Q: And when you went to the NTSB [National Transportation Safety Board] hearing, did you testify that you had smoked with Gates on the run?

A: No, I told them that we didn't smoke at all that day.

Q: You denied it?

A: Yes.

Q: And to your knowledge did Gates deny that also?

A: Yes.

\* \* \*

[130] Q: Had you ever—you had ridden before with Gates?

A: Yes. From what I know he's a good engineer, he knows all of the rules.

\* \* \*

## APPENDIX D

Excerpt from transcript of hearing before the Committee on Commerce, Science and Transportation, United States Senate, February 25, 1988

[89] THE CHAIRMAN [Senator Hollings]: . . . I take it on this one occasion that you pointed to in your own testimony, where you called in and said you were not ready to go to work, they said come on in anyway and that you looked okay. Can you elaborate on that?

MR. GATES: Well, it was a clerk that called me, that is required to order me for work. At that time he was going to show me refusing duty, which would have put me under disciplinary measures at work, and also it would cause him some hardships.

And so I told him more or less that I would show up at work if he would call the trainmaster that was on duty and tell him what condition I told him I was in. I told him I was drunk.

I told him I would have a friend of mine drive me to work because I was not capable of driving myself, and we would put it in his lap and let him decide, with no intention myself of actually having to run a train that night.

When I did show up, I stopped briefly and got a coffee and walked into the back room where the trainmaster's office was. My crew was already there with him and was aware of what to expect from me when I walked in. I was spilling the [90] coffee all over the place because I was not walking straight.

And he told me I looked okay and that another member of my crew would keep me awake during the trip.

THE CHAIRMAN: What about the attitude of the employees? That indicates to me that when you do get in trouble and know you are not in a condition, that you

do not mind stating so and you do have this responsibility foremost in mind.

If you had a vote amongst the employees you have been with on random testing, would they vote aye or no? Would they vote and say no, we do not want to have such a thing, or would they vote and really consider it good for them as well as the traveling public?

What would be your opinion?

MR. GATES: Well, I know the union's position on it. I cannot answer for the other employees. But I know for myself, I would think, based on that, others would answer similarly.

As I said before, denial is the hallmark of the disease. That is the main thing. Nobody wants to get caught. You will deny and you will lie your way out of it if at all possible, and you will do anything you can to keep from being tested positive, or to even take the test in some instances.

\* \* \*

[95] SENATOR DANFORTH: And have there been other cases, other than your own case, when the supervisor said, well, you are good enough to work? Do you know other cases when the supervisor had seen somebody on the job or seen somebody before he goes on the job and allowed him to proceed with his work?

MR. GATES: My case was the only one where I have experienced someone actually ordering me, knowing me and having me tell them I was intoxicated. I have been in other situations where the person I was working with, we both confronted a supervisor and we were—well, at least he was blatantly drunk, anyway, drunk enough to tell by looking and sniffing or whatever you want to do. And it was ignored.

[96] SENATOR DANFORTH: It was ignored by the supervisor?

MR. GATES: Yes, sir.

SENATOR DANFORTH: Do you think that during the 14 years you have been on the railroad that it has

been a common everyday occurrence that people have operated trains while they have been impaired by alcohol or drug use?

MR. GATES: As I said before, I have not worked there in the past year, but I have no reason to believe that anything has changed. It had slacked off for the past few years that I had worked there as far as visibility. That is why I cannot say whether some of the employees were continuing their practices or not.

But originally when I worked there, when I started working under Penn Central, it was a common everyday practice.

\* \* \* \*

## APPENDIX E

February 23, 1988

### FEDERAL RAILROAD ADMINISTRATION ACCIDENT INVESTIGATION UPDATE CHESTER, PENNSYLVANIA JANUARY 29, 1988 AMTRAK

#### BACKGROUND:

The accident occurred at 12:32 a.m. near Chester, Pennsylvania, when Amtrak's No. 66 (Night Owl) train—which should have been diverted to a clear track—was permitted to proceed onto a stretch of trackage occupied by a Maintenance of Way vehicle. The block tower operator who controlled the signal at the point where the Amtrak train should have been diverted fled the premises in mid-shift, immediately after the occurrence of the accident. The two locomotive units derailed and overturned. All 10 cars derailed and remained upright. The engineer and 18 passengers were injured.

#### CASUALTIES AND PROPERTY DAMAGE:

Nineteen people were injured. Property damage is estimated at \$297,150.

#### POST-ACCIDENT TESTING:

*Train Crew and Others:* Samples were obtained from the Amtrak engineer, conductor, four assistant conductors, the train dispatcher, a signal maintainer shortly after the accident, and from the block operator on the afternoon of February 1, 1988. One assistant conductor tested positive for the marijuana metabolite in the blood (27 ng) and urine (27 ng). Tests on all other crew members were negative.



*Block Operator:* The accident occurred at approximately 12:32 a.m. on January 29, 1988. The block operator left his post without authorization and accordingly was not available for post-accident toxicological testing required by FRA rules. On the afternoon of February 1, 1988, three and one-half days after the accident, the block operator met with representatives of the parties to the accident investigation.

At the conclusion of that interview, the block operator was asked if he would submit to testing under the Federal regulations, and he agreed to do so. He was then taken to a medical facility where specimens were collected shortly after 4:00 p.m. The samples were sent to the Center for Human Toxicology for testing under the FRA rule.

The block operator tested positive for the following compounds: for the marijuana metabolite in the blood (8 ng/ml) and urine (89 ng/ml); for the cocaine metabolite in the urine (81 ng/ml); and for methamphetamine (74 ng/ml) and amphetamine (48 ng/ml) (possibly present as a metabolite of methamphetamine) in the urine. Other tests for drugs and alcohol were negative.

In view of the fact that the block operator had absented himself following the accident, FRA instructed the Center to test his specimens down to the sensitivity of the particular tests to determine the smallest detectable amount consistent with the reliability of the test procedures and equipment. Since drugs and their metabolites are eliminated from the body over a period of time that differs by type of drug, frequency of use, dosage, and other factors, testing in the range below the normal "administrative detection limit" (or usual cut-off levels) extends the period during which the drug is detectable.

Attached is an excerpt from FRA's Field Manual that indicates the "general parameters" for drug detection over time. This table assumes normal screening and con-

firmation cut-offs higher than those employed in the subject tests.

William E. Loftus  
Angela Sullivan  
Federal Railroad Administration  
(202) 366-0881  
February 23, 1988

# RESULTS OF TOXICOLOGICAL ANALYSIS— BLOCK OPERATOR

Chester, Pa.; Amtrak; January 29, 1988  
(In Nanograms (ng) (per Mililiter))

Drug	Center for Human Toxicology (FRA)			
	Blood	Urine	( 1/ )	( 2/ )
Marijuana metabolite	8 ng.	89 ng	(20 ng)	( 20 ng)
Cocaine metabolite	neg.	81 ng	(10 ng)	(150 ng)
Methamphetamine	neg.	74 ng	(20 ng)	(100 ng)
Amphetamine <sup>3</sup>	neg.	48 ng	(20 ng)	(100 ng)

<sup>1,2</sup> Because the tests were not performed until the fourth day after the accident, FRA requested its laboratory to test the specimens down to the sensitivity of the assays (the lowest level at which the compound can be reliably identified). The first number in parenthesis is the sensitivity of the test; the second is the administrative reporting cut-off (on confirmation) for normal reporting purposes when specimens are collected within a reasonable time after the accident. The cocaine metabolite and methamphetamine/amphetamine results would have been reported as negative under normal reporting practices.

<sup>3</sup> Possibly present as a metabolite of methamphetamine.